IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

O R D E R

Smt. Prabha Tak v. State of Rajasthan & Ors.

S.B.CIVIL WRIT PETITION NO.5392/2003
under Article 226 of the Constitution of India.

Date of Order :: 4th July, 2007

P R E S E N T

HON'BLE MR.JUSTICE GOVIND MATHUR

Mr. M.S.Singhvi]
Mr. H.Dutt], for the petitioner.
Mr. RPS Choudhary, Additional Advocate General.
Mr. R.C.Joshi]
Mr. S.G.Ojha] for the respondent.
Mr. Rajesh Joshi]

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BY THE COURT :

REPORTABLE

The petitioner, a member of Rajasthan Administrative Service (RAS), by this petition for writ is claiming to be considered for promotion to selection grade of RAS against the vacancies relating to the year 1991-92 by redetermination of the number of vacant posts.

The factual matrix as emerging from pleadings of the case is that the petitioner become a member of RAS in the year 1978 and was promoted to its senior

scale against the vacancies of the year 1984. By an order dated 10.2.1992 she was promoted to the selection grade of RAS for the vacancy year of 1991-92 subject to review and revision as prescribed under Rule 28(B)(b) of the Rajasthan Administrative Service Rules, 1954 (hereinafter referred to as "the Rules of 1954") against the vacancies relating to seniority-cum-merit quota.

Relevant to note here that as per Rule 28(B)(6) of the Rules of 1954 selection for promotion to all higher posts or categories other than the junior scale of RAS is required to be made on basis of merit and on basis of seniority-cum-merit in equal proportion. For the year 1991-92 the respondent State determined 24 vacancies in selection grade of RAS available to general categories for promotion sought to be filled in by maintaining equal ratio under the quota of merit and seniority-cum-merit.

The Government of Rajasthan in compliance of the directions given by the Rajasthan Civil Service Appellate Tribunal, Jaipur (hereinafter referred to as "the Tribunal") in appeals No.345/88, 116/92, 227/83 and in light of judgment of Hon'ble Supreme Court in the case of Shambhu Singh Meena v. State of Rajasthan & Ors. [(1995)2 Suppl. SCC 431] ordered for review of the proceedings of the Departmental Promotion Committee (DPC) held earlier for the year 1987-88 to

1994-95, accordingly review was made and an order dated 23.2.1996 was passed making promotions to selection grade of RAS for the year 1987-88 to 1994-95.

By the order aforesaid promotion was given to the petitioner in selection grade for the vacancy year of 1992-93 against the vacancies relating to merit quota. By the same order 12 officers including one Shri S.D.Sharma were promoted to selection grade of RAS for the vacancies relating to the year 1991-92 against merit quota. A challenge was given to the promotion of the aforesaid Shri S.D.Sharma by respondent No.4 Shri O.P.Harsh before the Tribunal by way of filing an appeal that came to be accepted by judgment dated 9.9.1997 directing the State Government to promote respondent No.4 Shri O.P.Harsh to selection grade of RAS against the vacancies of the year 1991-92. Learned Tribunal held that Shri O.P.Harsh was senior to Shri S.D.Sharma and his candidature was not less meritorious than Shri S.D.Sharma, therefore, he was entitled to be promoted to selection grade of RAS against the vacancies relating to the year 1991-92.

An appeal preferred by respondent No.3 Shri B.L.Gupta also came to be accepted by the tribunal vide order dated 16.12.1998 with a direction to promote him to selection grade of RAS for the vacancy year of 1991-92. The respondent No.2 Shri Anil Kumar

Chaplot also preferred an appeal before the Tribunal that too came to be accepted vide order dated 21.6.1999 in following terms:-

> "In the light of the above, the appeal is accepted. The Respondent State Government is directed to hold review DPC for the year 1991-92 and consider Appellant's candidature; particularly in the light of selection of his junior Shri O.P. Harsh in that year. The last DPC took place on 23.2.96, while DOP's clarification regarding treating "Above Average" as "Very Good" was issued on 3.12.96. Hence the review DPC should grade the ACRs in the light of this clarification of the DOP. The other ACRs should be graded in the light of para 5. If selected the Appellate should be given all consequential benefits from the day, his juniors has been given such benefits. The Respondent State should hold the review DPC pertaining to the Appellate within three months."

The direction as above was give by holding Shri O.P.Harsh, a person junior to Shri Anil Kumar Chaplot, as such the State Government was required to review proceedings of the DPC and the case of Shri O.P.Harsh was also to be reconsidered being junior to Shri Chaplot.

Certain other appeals of similar nature preferred by respondents Sarva Shri Hanuwant Singh

Bhati, Murli Manohar Joshi, O.P.Saharan and Dharmendra Bhatnagar were also accepted by the Tribunal with a direction to consider their candidature for promotion against the vacancies of the year 1991-92 by holding meeting of DPC to review its earlier recommendations. In the case of Hanumant Singh Bhati (respondent No.6) the Tribunal while accepting the appeal also observed as follows:-

> "Before parting with this case, we would like to advise the State Govt. not to take piecemeal decisions in such matters; it is this tendency, which has triggered so much of avoidable litigation. If so many officers of the top State service have to knock the portals of the courts, it is not a happy augury. Some thing is seriously wrong somewhere. It is high time the State Govt. takes an integrated view of the entire issue instead of reacting in a mechanical way in each individual case. The State Govt. would be exposing itself to the charge of favouratism and discrimination if it selectively implements some of our decisions while stoutly contesting other cases of identical nature. It was mentioned before us that in pursuance of this Tribunal's order in the case of Shri O.P.Harsh, the year of allotment was revised from 1993-94 to 1991-92 while in other cases of similar nature. Cases are being contested in the Hon'ble Supreme Court and Hon'ble High Court. This embarrassing position can be avoided if a common view is taken on same of the hotly contested issues and uniform treatment is

> allowed to all the concerned officers, irrespective of the fact whether they have approached the courts or not."

In view of various orders of Tribunal the State Government by orders dated 26.3.1998, 25.1.2000, 9.6.2000 (Anx.6), 9.6.2000 (Anx.7), 9.6.2000 (Anx.8), 9.6.2000 (Anx.9), and 9.6.2000 (Anx.10), promoted respondents Sarva Shri O.P.Harsh, Hanumant Singh Bhati, Anil Kumar Chaplot, Om Prakash Saharan, Nathu Lal Verma, Murli Manohar Joshi and Dharmendra Bhatnagar respectively to selection grade RAS for the vacancy year 1991-92 against the vacancies of merit quota. By making such promotions the State Government exceeded vacancy quota available to be filled in by way of promotion under the criteria of merit. The petitioner also by way of filing an appeal before the Tribunal assailed validity and propriety of the order dated 23.2.1996 and the same is still pending consideration, however, from the averments contained in reply to that appeal the petitioner came to know about promotions of respondents No.3, 4, 6, 7, 8 and 9, hence she preferred this petition for writ.

The contention of the petitioner is that she is senior to all private respondents in the cadre of "RAS Senior Scale" but the State Government has given them promotions to selection grade for the year 1991-92 without considering her candidature. It is asserted that while considering cases of private respondents

for promotions under the directions of the Tribunal all earlier recommendations of the DPC relating to the year 1991-92 should have been reviewed and reconsidered instead of confining it for individuals in favour of whom orders were given by the Tribunal. According to the petitioner by reviewing and reconsidering candidature of those officers only who approached the Tribunal, the State acted in discrimination and also in violation of principles of natural justice as position of the petitioner in "selection grade of RAS" stood lower down due to promotion of her juniors.

It is also contended that grant of promotion in excess to the number of vacancies available for merit quota is illegal as it adversely effect rights of the senior officers in senior scale of RAS.

In reply, stand of the respondent State is that in compliance of the directions given by the Tribunal meeting of DPC was convened to consider individual cases and promotions were given without reverting junior officer. With the assertion above, the respondent State also stated that "shadow posts have been created in various years of selection scales of RAS but review DPC has not yet been convened, matter is under process". The stand as above is reiterated in reply to rejoinder as follows:-

> "That the contents of para No. 22 of the rejoinder are denied and the respondents reiterate whatever is stated in the reply to the writ petition. However, it is submitted that the matter of review for the promotions to selection scale for the year 1991-92 is under process. Hence, the rights of the petitioner cannot be said to have been affected."
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> (Underlining is by me)

Reply to the writ petition is also filed on behalf of the respondents No.2, 4, and 5 with preliminary objections as follows:-

> "1.That the petitioner has filed this writ petition while her appeal for the same cause of action i.e. challenging the order dated 23.2.96 is pending before the Tribunal. The memo of appeal has been placed on record with this reply and therefore this writ petition deserves to be dismissed on this ground alone.
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> 3.That the writ petition suffers from vice of delay and latches. The petitioner has not given any satisfactory answer for challenging the order dated 23.2.96 in the year 2003."

In reply to writ petition filed on behalf of respondents No.2, 4 and 5 it is also stated that Shri Vinod Ajmera was not promoted in compliance of any

order passed by the Tribunal but was promoted under the order dated 23.2.1996 itself. No order was passed by the respondent State to promote respondent Shri B.L.Gupta against the vacancies year of 1991-92. The order giving promotion to Shri Murli Manohar Joshi and Shri O.P.Saharan was not effected being stayed by Jaipur Bench of this Court. The respondents have also contested the averments made by the petitioner in petition for writ regarding her merit.

In rejoinder to the reply filed on behalf of the respondents the petitioner has mainly reiterated the facts and averments made in petition for writ.

Heard counsel for the parties.

I do not find any substance in the preliminary objections raised by the respondents. The petitioner has certainly filed an appeal giving challenge to the order dated 23.2.1996 giving promotions to 12 persons for the vacancies relating to the year 1991-92 against merit quota, however, that is on basis of relative merit of officers within the zone of consideration. The present petition for writ is preferred by the petitioner to assail validity of improper application of the directions given by the Tribunal by the Government while reviewing and reconsidering the recommendations of the DPC made earlier. The petitioner in this petition for writ has

also given challenge to grant of promotions in excess to the actual number of vacancies in RAS selection grades under merit quota. All these questions are not subject matter of appeal pending before the Tribunal filed by the petitioner.

I also do not find any inordinate delay in filing the instant petition for writ. As held by Hon'ble Supreme Court in the case of B.S.Bajwa & Ors. v. State of Punjab & Ors. (1998(2) SCC 523) the question of seniority should not be reopened after a lapse of reasonable period because that results in disturbing the settled position which is not justifiable but in the instant matter the promotions were given by the State Government under the orders issued in the year 2000 and yet some of the similar matters are pending consideration. An important aspect of the matter is that according to the State Government no process of review and reconsideration of the recommendations made by the DPC for the vacancies relating to the year 1991-92 has taken place so far and the promotions given to the private respondents were made by reviewing their individual merit, as such the issue involved in this petition i.e. of promotions for the RAS selection grade against the vacancies of the year 1991-92 is alive.

On merits, the first issue that requires determination is that whether the State Government was

right in giving promotions to the officers in selection grade under merit quota by creating shadow posts in excess to the vacancies available?

All promotions subsequent to the order dated 23.2.1996 are given by Government of Rajasthan in compliance of the directions given by the Tribunal. It is not in dispute that such promotions are in excess to the vacancies available for the promotions under merit quota. According to Rule 28(B)(1) of the Rules of 1954 as soon as the appointing authority determines number of vacancies as per Rule 9 of the Rules of 1954 and decide that a certain number of posts are required to be filled in by promotion, it shall prepare a correct and complete list of senior most persons who are eligible and qualified for promotion on the basis of seniority-cum-merit or on basis of merit to the class of posts concerned. Sub-rule(6) of Rule 28(B) of the Rules of 1954 provides that the selection for promotion to all higher posts or higher categories of posts in the service shall be made on basis of merit and on basis of seniority-cum-merit in the proportion of 50:50. According to sub-rule(11) clause (a) of Rule 28(B) of the Rules of 1954 the DPC is required to consider the cases of all senior most persons who are eligible and qualified for promotion to the class of posts concerned and shall prepare a list containing names of persons found suitable on basis of seniority-cum-merit and/or on basis of merit, as the case may

be, as per the criteria for promotion laid down under the Rules. The list so prepared on basis of seniority-cum-merit and/or on basis of merit, as the case may be, is required to be arranged in order of seniority relating to the category of posts from which selection is made.

In view of the Rules referred above, the respondent State is required to maintain an equal proportion of promotions to a higher post and even in the case of merit, seniority is having precedence if two persons under consideration for promotion have same merit. If the respondent State is permitted to make promotions under the merit quota in excess to the vacancies determined in accordance with Rule 9 of the Rules of 1954 then it shall certainly disturb the ratio prescribed under the Rules for promotion against the vacancies relating to seniority-cum-merit and merit. This will directly effect the rights of the senior persons in feeding cadre being superseded by juniors by their promotion under merit quota. In the instant matter, the equilibrium sought to be maintained while making promotions under the criteria of seniority-cum-merit and merit is disturbed by making promotions under the merit quota in excess to actual number of vacancies, the respondent State, therefore, committed an illegality that warrants interference of this Court for its rectification. If in any event the promotions under merit quota were

necessary to make in excess to the actual number of vacancies available, then the appropriate course before the respondent State was to enlarge the cadre strength and to create equal number of vacancies under the criteria of seniority-cum-merit also. In no case the ratio prescribed for promotion by adopting the criteria of seniority-cum-merit and merit could have been disturbed as it also disturbs the rotation rule of consideration for promotion.

Coming now to second question i.e. regarding mode to review and reconsider the recommendations made by the DPC, it is suffice to state that the merit based promotion incorporates the principle of equal opportunity to ensure selection of most capable person for a position and that refers to the right of every individual to be considered in scrupulously fair manner. The merit promotion process is designed to ensure selection of most capable and outstanding officers on basis of assessment of their relative merits, considering their potential and efficacy in governance and administration. All the officers coming within the zone of consideration for promotion on basis of merit are certainly efficient and meritorious officers but that only is not sufficient as from among number of persons the most capable officer on basis of relative merit is to be selected, thus, the individual assessment of merit and promotion under merit quota without examining and assessing merit of other

eligible persons is antithesis to the merit system of selection. Under the Rules of 1954 an equal proportion is required to be maintained while making promotions to the higher posts under the criteria of seniority-cum-merit and merit. The private respondents in favour of whom the Tribunal passed the orders to consider their candidature for promotion under the merit quota do not make them ipse-dixit entitled for promotions. The State Government should have reconsidered and reviewed the recommendations made by the DPC by considering candidature of all the persons coming within the zone of consideration.

In the case of Anil Kumar Chaplot learned Tribunal by order dated 21.6.1999 in quite unambiguous terms while accepting the appeal directed the State Government to hold review DPC for the year 1991-92 and to consider candidature of the appellant i.e. Mr. Anil Kumar Chaplot. The Tribunal also directed to adopt a specific mode for considering candidature of the eligible persons under the merit quota and that was upheld by this Court. In the case of Hanumant Singh learned Tribunal advised the State Government not to take piecemeal decision but to take an integrated view of entire issue and to consider cases of all eligible persons to avoid unnecessary litigation. The State Government instead of accepting the genuine advise given by the Tribunal decided to make promotions on individual basis by keeping the review and

reconsideration for promotions to selection grade of RAS against the vacancies of the year 1991-92 still pending. Once the State Government has accepted the mode of determination of merit, it should have reconvened the meeting of DPC at earliest and to make promotions in the cadre concerned as early as possible. As averred in reply to the writ petition on behalf of the State Government no review DPC has yet convened for making promotions to the RAS selection grade against the vacancies of the year 1991-92 and the promotions given to the private respondents other than Shri Vinod Ajmera are on basis of assessment of their individual merit. Such a mode is absolutely in contravention of the scheme of promotions designed to be made under merit quota. Such promotions without holding review DPC are illegal.

In view of the discussions made above, this petition for writ deserves acceptance. Accordingly, the same is allowed. The respondent State is directed to hold review DPC to make promotions to the RAS selection grade for the vacancies relating to the year 1991-92 against merit quota in accordance with the Rules of 1954 by taking into consideration candidature of all the persons coming within the zone of consideration. The State Government while making promotions to RAS selection grade against the vacancies of the year 1991-92 under the recommendations of the review DPC shall also ensure

maintenance of equal proportion of promotions under the quota of seniority-cum-merit and merit.

The promotions, against the vacancies of the year 1991-92, made to RAS selection grade by individual assessment of the officers after 23.2.1996 are declared illegal, however, the position of the persons so promoted shall not be disturbed till the review DPC takes place and promotions be made accordingly by appointing authority. The meeting of the DPC to review and reconsider candidature of the eligible persons for promotion to RAS selection grade against the vacancies year of 1991-92 shall be convened by the State Government within a period of three months from today and necessary orders of promotion shall be passed within a period of 15 days subsequent thereto.

No order to costs.

(GOVIND MATHUR),J.

Kkm/ps.